United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

76-1131, 76-1160

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JAMES SEELEY CYPHERS and
JAMES W. FERRO,

Defendants-Appellants.

Docket No. 76-1131
Docket No. 76-1160

SUPPLEMENTAL BRIEF FOR APPELLANT
JAMES W. FERRO

ON APPEALS FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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SUPPLEMENTAL BRIEF FOR APPELLANT JAMES W. FERRO

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OF THE UNITED STATES DISTRICT COURT
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QUESTION PRESENTED

Whether the Government's failure to try appellant Ferro before returning him to the custody of the State of Ohio violated the Interstate Agreement on Detainers and requires dismissal of the indictments with prejudice.

STATEMENT OF FACTS

On March 19, 1973, Postal Inspector Robert McDowall filed a complaint charging appellant Ferro and co-defendant Cyphers with, inter alia, a fraudulent scheme to obtain airline tickets by use of credit cards. Based on this complaint of March 19, an arrest warrant was issued, and appellant Ferro was arrested the following day.

Ten days after his arrest, on March 30, 1973, appellant Ferro was released on bail. On July 19, 1973, he surrendered to the State of Ohio to serve a term of imprisonment for a previous conviction under the laws of that State. On September 18, 1973, Indictment 73 Cr. 848 was filed in the Eastern District of New York (see appellant Ferro's main brief at 3). Two days later, the Government secured a writ of habeas corpus ad prosequendum (Record on Appeal, Document #9, 73 Cr. 848). Pursuant to that writ, appellant Ferro was transferred to federal custody, arriving at the Federal Detention Center in New York City on September 25, 1973. Approximately one month later, appellant Ferro was returned to state custody, and on November 30, 1973, a federal detainer was lodged against him with Ohio prison officials.*

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*This information has been confirmed through communication with the prison officials of the Ohio state prison where appellant Ferro was incarcerated.

On January 25, 1974, the Government secured a writ of habeas corpus ad prosequendum (Record on Appeal, Document #14, 73 Cr. 848), requesting appellant Ferro's presence in federal custody "for trial" on Indictment 73 Cr. 848. Shortly thereafter, in accordance with the writ, appellant Ferro was transferred to federal custody, remaining at the Federal Detention Center from the end of January until July 1974. During this period, Indictment 73 Cr. 848 was dismissed, and on April 23, 1974, superseding Indictment 74 Cr. 322 was filed. The superseding indictment charged appellant Ferro with the same scheme alleged in 73 Cr. 848, and re-alleged Count XX of Indictment 73 Cr. 848 as Count I of Indictment 74 Cr. 322. On May 13, 1974, the Government filed a notice of readiness for trial on the superseding indictment (Appellant Ferro's main brief at 6-7).

During the summer of 1974, approximately one and one-half years prior to appellant Ferro's trial, he was returned to the custody of the State of Ohio.

ARGUMENT

On July 19, 1973, appellant Ferro surrendered to the State of Ohio to serve a term of imprisonment. Shortly after filing Indictment 73 Cr. 848 on September 18, 1973, the Federal Government obtained appellant Ferro's presence in federal custody by writ of habeas corpus ad prosequendum. Approximately one month later he was returned to state custody.

On January 25, 1974, the Government again secured a writ of habeas corpus ad prosequendum, requesting appellant Ferro's presence for trial. Pursuant to this writ, appellant Ferro was transferred to federal custody and remained in federal custody for approximately seven months. Thereafter, despite the fact that the Government had filed a detainer on November 30, 1973, and a notice of readiness for trial on May 13, 1974, and had secured appellant Ferro's presence for the purpose of trial, the Government failed to try appellant Ferro prior to his return to state custody. This failure violated Article IV(e) of the Interstate Agreement on Detainers. Accordingly, Indictment 74 Cr. 322 must be dismissed with prejudice, precluding appellant Ferro's re-indictment on 75 Cr. 259. United States ex rel. Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975); United States v. Mauro, 414 F.Supp. 358 (E.D.N.Y. 1976), appeal pending, 2d Cir. Doc. Nos. 76-1251, 76-1252.

In 1970, Congress adopted the Interstate Agreement on Detainers (18 U.S.C.A. Appendix), a compact providing a uni-

form procedure for obtaining the presence for trial of criminal defendants, such as appellant in this case, who are incarcerated in other jurisdictions.* Article III of the agreement specifies the means by which a prisoner may demand trial of any untried complaint or indictment that is the subject of a detainer lodged by a party state. Article IV, on the other hand, provides the means by which a state (including the Federal Government) which has lodged a detainer may obtain the defendant from another jurisdiction for temporary custody for trial:

> (a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated....

Article IV establishes two conditions for a state that detains a prisoner, like appellant, in one jurisdiction for trial in another: first, that a trial on the charges forming the basis for the detainer be held within 120 days unless the court grants a continuance "for good cause shown in open court, the prisoner or his counsel being present." Art. IV(c).

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*Ohio is also a party to the agreement, Ohio Rev. Code §2963.30, having adopted the agreement effective November 18, 1969.

Article IV(e)* provides the second principal condition:

> If trial is not held on any indictment, information, or complaint contemplated hereby prior to the prisoner's being released to the original place of imprisonment pursuant to Article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

There is no doubt that the United States, which had lodged a detainer in Ohio, made a request to that state for the custody of appellant Ferro for trial. In fact, the Government's writ of habeas corpus ad prosequendum, issued in January 1974, stated specifically that it was for this purpose. Moreover, there can be no dispute that the conditions of Article IV of the Interstate Agreement were not met here. Despite the language of Article IV(e) prohibiting the transfer back of a prisoner prior to disposition of the charge, appellant Ferro was returned to Ohio before his federal trial was held. Once that transfer occurred, under Article IV(e) of the agreement the court was bound to dismiss the indictment with prejudice. United States ex rel. Esola v. Groomes, supra; United States v. Mauro, supra; see also United States v. Ricketson, 498 F.2d

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*Since this section does not require any defense motion prior to the court's order, this issue has not been waived by defense counsel's failure to move to dismiss under the agreement at trial, and the issue may be raised on appeal. See United States v. Ricketson, 498 F.2d 367, 373-373 (7th Cir.), cert. denied, 95 S.Ct. 227 (1974).

367, 373 (7th Cir.), cert. denied, 95 S.Ct. 227 (1974) ("[T]here are no exceptions to the requirement that that defendant not be returned to state custody untried.")*

Groomes and Mauro are directly on point. There, as here, prisoners were transported from their place of incarceration to the jurisdiction that had lodged a detainer pursuant to a request for temporary custody via a writ of habeas corpus ad prosequendum. In both cases, as here, the defendants were produced for trial. Moreover there, as here, the defendants were returned to the original jurisdiction prior to trial. Thus here, as there, dismissal must result.**

One of the principal reasons for the adoption of the Interstate Agreement was to minimize the adverse impact, caused by unprocessed and untried detainers, of a foreign

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*Moreover, the proceedings in this case also violated the requirement of Article IV(c) that the defendant be tried within 120 days of the arrival of the defendant in the receiving state.

**In Groomes, the court remanded the case rather than dismissing the indictment only because the court below had failed to make any findings of fact on the validity of the allegations.

prosecution on inmate rehabilitation.* In particular, when a prisoner is needlessly shifted between two jurisdictions, successful rehabilitation is foreclosed because of the lack of presence of the inmate in a single jurisdiction, the adverse psychological effects of the still-unprocessed detainer, and the possibility that the detainer will prejudice probation, parole, and/or desirable work assignments in prison. United States v. Mauro, supra, 414 F.Supp. at 360; United States ex rel. Esola v. Groomes, supra, 520 F.2d at 836-837; United States v. Cappucci, 342 F.Supp. 790 (E.D.Pa. 1972); 116 Cong. Rec. 14000 (1970) (Remarks of Congressman Poff).

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*The purposes of the agreement, as set forth in Article I, are as follows:

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trials of persons already incarcerated in other jurisdictions, produce uncertainty which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and the determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to promote such cooperative procedures.
>
> 18 U.S.C. Appendix.

Here, the Government's failure to comply with the agreement in fact resulted in a specific violation of the purposes of the agreement, since it prevented parole consideration until September 1974 after appellant was returned to state custody.*

Because the agreement is "obviously remedial in character" (see United States ex rel. Esola v. Groomes, supra, 520 F.2d at 836; State v. West, 191 A.2d 758, 760 (N.J. App. 1966); People v. Esposito, 37 Misc.2d 386 (N.Y. 1960)), it should be construed liberally to effect its purposes. As both cases considering this issue have held, where the Interstate Agreement on Detainers is applicable for securing the presence of a defendant in custody, it is the exclusive process for doing so, and the Government is charged with having invoked its provisions by use of the writ of habeas corpus ad prosequendum. United States ex rel. Esola v. Groomes, supra; United States v. Mauro, supra. Thus, while the Interstate Agreement has many advantages for the Government, the drafters included the modest and easily followed sanctions of IV(e) prohibiting transfers.

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*As a result of appellant Ferro's initial parole consideration in September 1974, six months after it was originally scheduled appellant Ferro was granted parole.

Since the agreement was fully applicable here, the Government must be held to have obtained appellant Ferro pursuant to the agreement. Consequently, once appellant was returned to state custody before being tried, in violation of Article IV(e), Indictment 74 Cr. 322 should have been dismissed with prejudice, precluding any further indictment on the scheme alleged and requiring the dismissal of Indictment 75 Cr. 259.*

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*In Mauro, the Government also argued that the Agreement on Detainers only applies to the Government when it acts as a "sending state," and does not apply when the Federal Government secures a prisoner from state custody. There are at least three problems with this argument: First, the cases interpreting the Agreement have, without dissent, treated the Government as a receiving state as well as a sending state. United States v. Mauro, supra; United States v. Mason, 372 F.Supp. 651 (N.D.Ohio 1973). Second, there is absolutely no evidence from the legislative history of the adoption of the Agreement that such a limitation was intended (see 3 U.S. Code Cong. Admin. News 4864, 4866, 4869 (1970)). Most significantly, the Agreement, by its terms, contains no such limitation.

CONCLUSION

For the above-stated reasons and the reasons discussed in appellant Ferro's main brief, the indictments should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

September 30, 1976

I certify that a copy of this supplemental brief ~~and appendix~~ has been mailed to the United States Attorney for the Eastern District of New York and to counsel for appellant Cyphers.

Jonathan J. Silbermann